IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Smt. Rakheli Bai vs. Pyare Lal & ors.

S.B. Civil Second Appeal No.13/1986 against the judgment and decree dated 29.8.1985 passed by the learned Addl. District Judge, Rajsamand in Civil Appeal No.33/82.

Date of Judgment: March 10, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. Manish Shishodia along with Mr. Mohd. Aslam for the appellants.
Mr. D.D.Thanvi & Mr. Arvind Shrimali for the respondent.

BY THE COURT:

This second appeal has been filed by the defendants against the judgment and decree passed by the first appellate court dated 29.8.1985 as the first appellate court reversed the judgment and decree dated 18.8.1982 of dismissal of the suit of the plaintiff-respondent and decreed the suit of the plaintiff-respondent for injunction for the part of the property. The plaintiff-respondent also submitted cross-objection to challenge the dismissal of his suit for injunction for the property ABCD.

Brief facts of the case are that the plaintiff filed the suit for

prohibitory injunction for the two plots, one described as plot ABCD and another as EFGH. Both the plots were purchased by the plaintiff by registered sale-deeds. plot ABCD was purchased from Shanker Lal vide registered sale-deed (Ex.2) and plot EFHG was purchased from Banni Bai (Ex.1). Plot ABCD is having measurement 16' x18' whereas plot EFGH is 30'x47'. According to the plaintiff, all the four defendants are real brothers and they intended to encroach upon the plaintiff's plots and on 15.9.1972 forcibly put some stone-slabs in the portion of the plot shown in red colour in the plot ABCD and also collected material for raising construction over plot EFGH. The plaintiff immediately lodged complaint before the concerned police station on 20.9.1972. By the time of the filing of the suit, the defendants after putting stone-slabs, opened a door in plot ABCD. Therefore, the plaintiff filed the suit for permanent injunction and also prayed that the plaintiff may be declared owner of the suit property and in case defendants succeed in taking possession of the said plots, the possession be delivered again the the plaintiff.

The defendants submitted written statement denying the plaint allegations and submitted that so far as plot ABCD is concerned that plot is covered by the defendant's *Bapi-Patta* and defendants' old possession is there on the said land. For plot EFGH, it is submitted that the said plot was sold by Banni Devi and Pyari Bai to defendants in the Samvat

Year 2022 for a consideration of Rs.30/- and seller also executed sale-deed in favour of the defendants. The defendants denied the possession of the plaintiff over the plot in dispute. It appears that both the sellers Banni Devi and Shanker Lal were also impleaded as parties defendants in the suit. Banni Devi supported the defendants by admitting the sale in favour of the defendants of the Samvat Year 2022 whereas Shanker Lal submitted the written statement and admitted that he sold the plot to plaintiff on 23.10.1970. However, neither Banni Devi nor Shanker Lal gave evidence as defendants or as witness of any of the purchaser. The plaintiff produced witnesses PW-1 Nensa, PW-3 Pyare Lal, PW-4 Mohan Lal and PW-5 Chhoga Lal and also gave his own statement. The plaintiff produced the sale-deeds Ex.2 and Ex.3 and also proved the sketch-map, in addition to other documents. The defendants produced witnesses DW-1 Banshi Lal and DW-3 Hangami Lal. The defendants also produced the alleged sale-deed Ex.D.1 and map Ex.D.3 and copy of one order Ex.D.2 of Municipal Board, Deogarh. Other documents were also produced by the defendants.

The trial court dismissed the suit of the plaintiff more because of the reason that in view of the trial court, the plaintiff came with a case that he purchased the plot from Shanker Lal but did not produce Shanker Lal and other seller Banni Bai submitted written statement supporting the defendants and admitted the sale in favour of the

defendants which is earlier in time and because of the reason that the plaintiff himself admitted that the defendants put some stone-slabs over the plot in dispute, therefore, the plaintiff failed to prove title and possession both. The judgment and decree of the trial court dated 18.8.1982 was challenged by the plaintiff by preferring regular first appeal. The first appellate court after appreciation of the evidence, held that the plaintiff proved his case for grant of permanent injunction with respect to the property covered by the boundary described in the map EFHG, whereas maintained the dismissal of the suit of the plaintiff for the plot ABDC.

Being aggrieved against the judgment and decree of the first appellate court dated 29.8.1985, the defendants preferred this appeal whereas the plaintiff has submitted cross-objection. Following substantial questions of law were framed by this Court while admitting the appeal on 23.1.1987:-

> *"(1) Whether the learned lower appellate court is right in holding that the defendants' possession was an act of tress-pass only?*
>
> *(2) Whether the learned lower appellate court is right in reversing the trial court's decision on issue No.5 that the plaintiff is not entitled to maintain the suit for injunction in the absence of his possession over the disputed land?"*

Before proceeding to decide these substantial questions of law, it

will be worthwhile to recapitulate the facts in brief. The plaintiff and defendants both are claiming the plots on the basis of their title. So far as plot no. EFHG is concerned, for this, the trial court accepted the contention of Banni Bai in written statement as the final proof against the case of the plaintiff, ignoring the fact that Banni Bai did not appear in the witness-box and thereby the plaintiff did not get any opportunity to cross-examine the said seller. Apart from it, the trial court did not even look into the alleged sale-deed Ex.D.1 produced by the defendants. Said sale deed is five line deed and is not registered one(as consideration for sale has been shown only Rs.30/-). Ex.D.1 says that by this document, said Banni Bai sold her share in one *Nohra* for a consideration of Rs.30/-, whereas the suit property is the plot. No description of the sold property is given in Ex.D.1, nor it is mentioned that the possession was delivered to the purchaser by the seller. Such suspicious document was rightly not relied upon by the courts below. The first appellate court carefully considered the facts of the case and oral evidence produced by both the parties and thereafter rightly after rejecting the claim of the defendant on the basis of sale-deed Ex.D.1 held that plot EFHG belongs to the plaintiff and rightly decreed the suit of the plaintiff for the said plot EFHG.

So far as plot ABCD is concerned, the first appellate court pointedly pointed out serious discrepancies in the neighbourhood given

by the plaintiff in the plaint and in the sale-deed produced by the plaintiff of plot ABDC. These discrepancies have not been explained by the plaintiff who has submitted cross-objection to challenge the dismissal of his suit. None of the learned counsel could point out any misreading of the evidence by the first appellate court or non-consideration of any material evidence, therefore, so far as finding of fact recorded by the two courts below about the two plots as stated above, for plot ABDC, the plaintiff failed to prove his case and for plot EFHG, the defendants failed to prove their right is concerned, that has not been vitiated.

In the backdrop of these facts, we may look into the substantial questions of law which were framed by this Court while admitting the appeal. For plot EFHG, the act of the defendants as given out by the plaintiff and his witnesses and found proved from the evidence of the witnesses of the defendants, can only be act of tress-pass and the possession of the defendants by putting certain stone-slabs cannot be said to be a possession as settled possession or a possession of owner of the property. Therefore, in the facts of the case, the first appellate court rightly held that the defendants' possession is no possession, which cannot be removed by the decree of injunction.

So far as substantial question of law no.2 is concerned, the plaintiff failed to prove not only title of the property ABDC but he also

failed to prove his possession, therefore, the plaintiff was not entitled for any relief of injunction. The person who has no title, cannot get the decree for injunction against the person who is in occupation, therefore, the substantial question of law no.2 is decided accordingly.

In view of the above discussion, I do not find any merit in the appeal as well as in the cross-objection and both are dismissed. No order as to costs.

(**PRAKASH TATIA),J.**

mlt.